

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

NICHOLAS MARTIN, individually and on	)	
behalf of a class,	)	
	)	
Plaintiff,	)	11-cv-03104
	)	
v.	)	Judge Charles P. Kocoras
	)	
	)	Magistrate Judge Morton
MIDLAND FUNDING LLC;	)	Denlow
	)	
	)	
Defendant.	)	
	)	

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DAVE SCARDINA, individually and on	)	
behalf of a class,	)	
	)	
Plaintiff,	)	11-cv-3149
	)	
v.	)	Judge George W. Lindberg
	)	
MIDLAND CREDIT MANAGEMENT, INC.;	)	Magistrate Judge Jeffrey T.
MIDLAND FUNDING LLC;	)	Gilbert
ENCORE CAPITAL GROUP, INC,	)	
	)	
Defendants.	)	

**PLAINTIFF SCARDINA’S OBJECTION TO MOTION  
FOR REASSIGNMENT OF RELATED ACTION**

Plaintiff Dave Scardina (“Plaintiff”) hereby submits the following objections to Defendant Midland Funding LLC’s Motion for Reassignment of Related Action to relate *Martin v. Midland Funding, LLC*, No. 11 -cv-03104 (N.D. Ill.), currently pending before this Court, and *Scardina v. Midland Credit Management, Inc.; Midland Funding LLC and Encore Capital Group*,

*Inc.*, No. 11-cv-3149 (N.D.Ill), currently pending before Judge Lindberg. Plaintiff Scardina opposes the motion for relatedness because:

1. Reassigning *Scardina* will not result in a substantial saving of judicial time and effort because the *Martin* case contains complicated state legal questions relating to consent which are not present in *Scardina*;
2. If it is reassigned, *Scardina* will be substantially delayed by the complicated state legal questions relating to consent that are raised in *Martin* but not present in *Scardina*;
3. Prior to the motion to reassign, Judge Lindberg has issued a substantive ruling in *Scardina* and discovery is proceeding on a short discovery schedule. Thus it creates the appearance that defendants' motion to reassign is an attempt to stall *Scardina*.

### **BACKGROUND**

The *Martin* case was filed on May 10, 2011 (*Martin* complaint attached as **Exhibit A**) and the *Scardina* case was filed on May 11, 2011 (*Scardina* complaint attached as **Exhibit B**). An amended complaint was filed in *Martin* on July 14, 2011 (*Martin* amended complaint attached as **Exhibit C**).

In his complaint, Scardina alleges that Midland Credit Management Inc, ("MCM") placed automated calls to plaintiff's cell phone in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(b) and that Defendants Midland Funding LLC and Encore Capital Croup, Inc. are liable for MCM's acts. Scardina brings his lawsuit on behalf of a class of persons with Illinois cellular phone numbers called between May 11, 2007 and May 31, 2011. Plaintiff Scardina alleges he did not consent to the calls or provide his cell phone number to Defendants or

the creditor, but that his cell phone number was obtained through a skip-trace by a debt collector hired by the original creditor, HSBC. **Exhibit B**, ¶¶ 32-32.

In both his original complaint and amended complaint, Martin alleged that Defendant Midland Funding LLC, or someone on its behalf, called Martin on his cell phone using an “automatic telephone dialing system” in violation of the TCPA. Martin brings his lawsuit on behalf of a class of persons who had Illinois addresses between January 1, 2008 and November 24, 2008. Plaintiff Martin makes no allegations addressing the questions of whether he consented to calls on his cellular telephone. In his original complaint, Martin alleges that Midland Funding LLC did not have an Illinois Collection Agency Act license when it obtained the Martin debt and therefore, under *LVNV Funding, LLC v. Trice*, \_\_ N.E.2d \_\_, 2011 WL 947129 (1<sup>st</sup> Dist. Mar. 16, 2011) (**Exhibit D**), as modified June 30, 2011 (**Exhibit E**) did not have consent to call Martin. However, Midland Funding, LLC did not make any phone calls to anyone. *Scardina* complaint, **Exhibit B**, ¶¶ 7-8. Midland Funding LLC merely owns the debts. *Id.* Midland Credit Management, Inc. (“MCM”) makes any calls on behalf of Midland Funding LLC. *Id.* Significantly, Midland Credit Management, Inc. did have a debt collection license in Illinois. (**Exhibit F**). Encore Capital Group, Inc. is the parent of both Midland entities. **Exhibit B**, ¶ 14.

Martin’s claims therefore turn on the following unique state law propositions:

1. Midland Funding LLC needed a collection agency license even though contacts were made by MCM, which had a license;
2. The failure of Midland Funding LLC to have an Illinois license prevents it from taking advantage of consent provided to the creditor for purposes of a federal statute.

Discovery has proceeded in *Scardina* before Judge Lindberg. On June 8, 2011, Judge Lindberg ordered that discovery, including expert discovery, be completed by September 28, 2011. (Dkt. No. 22). Rule 26(a)(1) disclosures were made by each party. Plaintiff has served and defendants have answered Plaintiff's first set of discovery. The parties have scheduled a Rule 37 conference. No discovery was sent in *Martin* until shortly before the motion to reassign was filed.

Furthermore, Midland filed a motion to stay *Scardina*. That motion was denied. (**Exhibit G**). In that opinion, Judge Lindberg addressed the substantive question of whether a federal court has subject matter jurisdiction over TCPA cases and found that he had jurisdiction.

#### **I. THE SCARDINA LITIGATION WILL BE PREJUDICED BY A REASSIGNMENT**

Consent is an affirmative defense under the TCPA. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Protection Act of 2005*, CG Docket No. 02-278; CG Docket No. 05-338, FCC 06-42, ¶12, 21 FCC Rcd 3787; 2006 FCC LEXIS 1713; 38 Comm. Reg. (P & F) 167 (April 6, 2006). We believe that, based upon our experience in other cases, that discovery will show that consent as raised by the allegations in *Scardina* is a simple matter of making a ministerial review of records to determine if a cell phone number was provided to the creditor by the debtor. See, eg. *Balbarin v. North Star Capital Acquisition, LLC*, No. 10 C 1846 (Jan. 5, 2011)(**Exhibit H**).

Consent in *Martin* presents a complicated state law question. Neither the *Martin* complaint nor the amended complaint alleges that *Martin* did not give consent to be contacted on his cellular telephone. (Thus *Martin* does not appear to be a member of the *Scardina* class.) The original complaint asserts that because Midland Funding LLC was not licensed in Illinois between January 1, 2008 and November 24, 2008, it cannot validly obtain consent, relying on *LVNV*

*Funding, LLC v. Trice*, \_\_ N.E.2d \_\_, 2011 WL 947129 (1<sup>st</sup> Dist. Mar. 16, 2011)(**Exhibit D**), as modified June 30, 2011(**Exhibit E**)), Complaint, ¶¶ 1-7, Exhibit A, even though the entity that did collect on debts during that time period (MCM) did have a license. The class in the *Martin* amended complaint is limited to the time period during which Midland Funding LLC was unlicensed in Illinois. Martin did not sue Midland Credit Management, Inc., the debt collector who was licensed in Illinois, nor Encore Capital Group, Inc., the parent.

Furthermore, the *Trice* decision was amended on a motion for rehearing subsequent to the filing of the initial *Martin* complaint to delete any language that a purchase made by an unlicensed entity is unlawful. Compare **Exhibits D** with **Exhibits E**.

The state law question of whether an unlicensed entity can obtain consent under the TCPA is not present in *Scardina*. Determination of that issue will stall *Scardina*.

## **II. DEFENDANT'S MOTION WILL DELAY RESOLUTION OF SCARDINA.**

Although *Martin* was filed one day before *Scardina*, litigation has proceeded at full speed in *Scardina*, but not in *Martin*. A short discovery cut-off date of September 28, 2011 has been set, written discovery served on defendant, responded to and a Rule 37 conference is to take place on July 23, 2011. A face to face settlement conference is set for July 29, 2011. Finally, defendant filed a motion to stay *Scardina*, which was promptly denied by Judge Lindberg. It appears that defendant's motion for relatedness is motivated not by a desire to conserve judicial resources, but rather avoid the judicial assignment and stall *Scardina* while a complicated issue of state law is determined by this Court.

WHEREFORE, Plaintiff Scardina respectfully requests that this Court deny the motion for reassignment based upon relatedness.

Respectfully submitted,

s/Cassandra P. Miller  
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**CERTIFICATE OF SERVICE**

I, Cassandra P. Miller, hereby certify that on July 26, 2011, I caused to be filed the foregoing documents via the CM/ECF System. I also caused the foregoing document to be sent via US mail to the following:

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